Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 43-2010

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 1686, Complainant, -vs- CITY OF HELENA, Defendant.	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

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I. Introduction

On June 23, 2010, Laborers International Union of North America, Local Union No. 1686, hereinafter LIUNA, Local 1686, or Union, filed an unfair labor practice charge with the Board of Personnel Appeals (BOPA or Board) alleging that the City of Helena, hereinafter the City, committed an unfair labor practice by violating 39-31-201 MCA. Jay Reardon, LIUNA Field Representative represents Local 1686 in this matter. David Nielsen, City Attorney, represents the City and has filed an Answer denying that the City committed an unfair labor practice.

John Andrew was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties and communicated with them as necessary in the course of the investigation.

II. Background and Discussion

To establish a foundation for this charge one must first look to the history of a unit decertification petition (DC 1-2010) filed with the BOPA by Steven Nelson on April 8, 2010. The petition triggered a Board election to determine whether the City of Helena Parks, Street, Traffic and Solid Waste Department would continue to be represented by Local 1686. No interveners filed with the Board and pursuant to agreement of the City and Local 1686 a Board supervised mail ballot election was conducted to determine the issue of representation. Polling closed at 3:30 p.m. on June 4, 2010. Ballots were counted in the presence of the Board election judge as well as a Board observer. Present for the City was Rae Lynn Nielsen, City of Helena Human Resources Director. Mr. Reardon attended the election on behalf of Local 1686. Ballots were tallied on June

4, 2010. There were 34 bargaining unit employees eligible to vote in the election. Of the 33 valid votes cast 14 voters favored representation by Local 1686 and 19 ballots were cast for no representation. There were no challenged ballots. At the conclusion of the ballot count the parties were advised of their right to file election challenges. None were filed so on June 11, 2010, the Board election judge certified the results of the election. No unfair labor practice charges were filed by either the City or Local 1686 prior to the Board certification letter of June 11, 2010. It was on June 23, 2010, that Local 1686 filed its unfair labor practice complaint against the City.

On March 23, 2010, a meeting was held at 7:00 a.m. at the city shop located at 3001 East Lyndale. Management officials present at this meeting were Rae Lynn Nielsen and Benjamin Sautter, the Streets/Traffic/Solid Waste Superintendent for the City of Helena.

It is the meeting at the East Lyndale location that is at the heart of the charge of Local 1686. The Union contends:

> "By knowingly allowing supporters to solicit signatures at a meeting called by the employer to discuss decertification options the employer has by its presence violated MCA 39-31-201 which allows employees the right to choose representation freely without any interference restraint or coercion."

The Union further contends:

> "By promising members that they would maintain current wages and benefits if they decertified the union the employer committed an unfair labor practice by bargaining with individual members and not the exclusive representative of the union."

In terms of relief, Local 1686 asks that the Board overturn the results of the June 4, 2010, election that decertified Local 1686 as the exclusive bargaining representative.

In its Answer to the charge, the City has raised several legal/procedural issues which, in the view of the City, make this complaint without merit. Before considering them, it is first necessary to address the factual allegations that are made by the Union which, in the view of the City, also make the complaint without merit.

By way of background, the East Lyndale shop is the reporting place for employees in the traffic and streets divisions. Drivers in the solid waste division, commonly referred to as sanitation, report to a separate building also at the East Lyndale address. Transfer station employees, part of the solid waste division, report to work at the transfer station located at 1975 North Benton. Parks division employees are in the same bargaining unit as streets, traffic and solid waste employees, but they are under a supervisor other than Mr. Sautter and report to work at the civic center.

The City contends that the March meeting was one it did not call, but rather was held at the request of bargaining unit members. Ms. Nielsen indicates that it was Mr. Sautter who approached her about meeting with employees in his division to answer their questions. According to Mr. Sautter, it was Carl Gibson, a streets division employee and bargaining unit member, who approached him about setting up a meeting. Mr. Gibson had been the shop steward for the streets division, but he resigned that position

in February of 2010. According to Mr. Gibson his steward position was never filled, but this was unknown to the City as it still believed him to be a Union steward. Mr. Gibson confirmed to the investigator that it was he who called for the meeting as, according to Mr. Gibson, there was dissatisfaction within the bargaining unit with their representation and unit members did have questions they hoped the City could answer. It was also Mr. Gibson who confirmed with bargaining unit members that a meeting would be held as well as when and where it would be. There were no formal notices prepared by either the City or Mr. Gibson, but rather notice was by word of mouth. According to Mr. Gibson approximately 12 people attended with no one from solid waste in attendance. Mr. Gibson and Ms. Nielsen recall there being one employee from parks in attendance, but Dan Trettin, another employee interviewed by the investigator recalls two parks employees in attendance. Mr. Trettin did not dispute the approximate number of attendees, but he did express a concern that so few of the divisions were represented at the meeting and that so few people were in attendance. He felt there should have been better notice of the meeting.

All of the above is significant as it points out that not only was this not a City-initiated meeting, but it was one called and noticed to unit members by the most recent steward in the Union. This was hardly a meeting called by the City to instigate decertification and, arguendo, if it were, why would the City not call a meeting that included all divisions in the bargaining unit? If the answer to that question was that the City met individually with the various divisions at their various work locations that would be one thing, but in actuality the answer is that there were no further meetings attended by the City. Thus, in terms of the March meeting, there is no evidence that this meeting was called by the City or was for the purpose of fostering a decertification action or that it evolved into the City encouraging decertification. Further, concerning the allegation that a decertication petition was distributed in the meeting, Mr. Gibson, who voluntarily offered to the investigator that he was one of the originators of the decertification effort, said that he never saw a petition or petitioning efforts at the meeting. This is consistent with the recollection of Ms. Neilsen. Mr. Trettin, who voluntarily offered to the investigator that he was in favor of the Union remaining, indicated that he recalled a petition, but could not recall at which meeting he saw the petition and that it may have just as well been at a meeting held after hours outside the East Lyndale facilities. In short, there is no substantial evidence offered to show that City officials were involved in any decertification activities during the March meeting. All indications are that management officials at the meeting provided factual answers to the best of their ability and fostered neither pro or anti union sentiment. No violation of 39-31-201 MCA occurred at this meeting and factually, it is simply improbable that this meeting influenced the results of the June 4, Board election.

Concerning the procedural questions raised by the City, Local 1686 has acknowledged to the investigator that it knew of the March meeting before the decertification election yet it did not file an unfair labor practice charge prior to the vote count. The fact that the Union failed to file a charge prior to the election does not constitute a waiver on the part of the Union to object to pre-election employer conduct that may have constituted an unfair labor practice. See, for instance, Ed Chandler Ford, Inc. 101 LRRM 1056 (1979) and Great Atlantic & Pacific Tea Company, 31 LRRM 1189 (1952) and Virginia Concrete Corp., Inc., 172 LRRM 1169 (2003). Nor, because of the results of the election decertifying Local 1686, is the Union precluded from filing an unfair labor practice charge. This is the case since the March 2010 meeting occurred at a time when Local 1686 was clearly the exclusive representative for Streets/Traffic/Parks and

Solid Waste. The meeting occurred within the six month filing period referenced in 39-31-404 MCA which provides that such a charge may not be filed, " . . . based upon any unfair labor practice more than 6 months before the filing of the charge with the board . . . " There is no bar to filing the complaint that can be found by the investigator. Thus, the issues remain as to whether there is merit to the complaint and additionally, whether the complaint constitutes a basis for setting aside the election results, particularly when there was no election objection filed within the 5 day requirement of ARM 24.26.666 (1).

Here, Local 1668 asks that the BOPA set aside the election results because the City "corrupted the election process" thus disturbing the "laboratory conditions" referred to in General Shoe Corp, 21 LRRM 1337 (1948) necessary to ensure a free choice for representation in the election process. There simply is no merit that can be found to the allegations of Local 1686. The March meeting was not called by the employer let alone for the purpose of instigating decertification. There were no statements made by management officials at the meeting that were anti-union or that in some way interfered with the rights of the Union or bargaining unit members. There was no coercive atmosphere and even if a decertification petition was present when the meeting was held, and that is far from a certainty, all indications are that the management officials went out of their way to avoid any impropriety in terms of advising unit members on decertification or, with any degree of certainty, what would happen in terms of wages and pension benefits should decertification happen. There is no basis for finding that 39-31-201 was violated.

This still leads to the question of whether conduct of the employer should be the basis for setting aside the results of an election. Whether or not an unfair labor practice was committed, the Board has the ability to set aside elections. See, for instance, Thrifty Auto Parts, 131 LRRM 1801 (1989). In fact, it is generally held that the National Labor Relations Board holds its certifications subject to reconsideration and that the federal board can modify, amend or even revoke certifications and/or election results. See Garren, Fox and Truesdale, How To Take A Case Before the NLRB, 231-81 (7th ed. BNA Books 2000) and Union Nacional de Trabajadores, (Carborundum Co, of P.R.) 90 LRRM 1023 (1975), 540 F2d 1, 92 LRRM 3425 (1st Cir. 1976) *cert denied*, 429 U.S, 1039, 94 LRRM 2201 (1977). Further, on the federal level, the NLRB may refuse certification if the legality of any stage in the representation proceeding is properly called into question, Worthington Pump & Mach. Corp., 30 LRRM 1052 (1952) Since Montana law is patterned after the National Labor Relations Act the BOPA can, and often does, look for guidance from the NLRB and the federal courts. There is no reason to believe why the same policing authority exercised by the NLRB is not also appropriate for the BOPA to exercise in the public sector in Montana if an issue in controversy is properly brought before the Board. The federal cases reviewed by the investigator were premised on the party objecting to certification or election results filing objections within the time period required under federal rules. That period of time is there for a reason – to bring stability to bargaining relationships. Local 1686 never filed an objection to the election conducted by BOPA. ARM 24.26.666(1) provides:

> BALLOT TALLY AND OBJECTIONS
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> (1) Ballots will be tallied on the day of the election. Within five working days after the tally of ballots, the parties to the election may file objections with the board relating to the conduct of the election or conduct affecting the results of the election. The board agent conducting the election will attempt to notify the parties of the

results of the ballot tally. However, in either on site or mail ballot elections the burden is on the parties to confirm the election tally with the board agent assigned to the election.

(2) Objections relating to the conduct of the election or conduct affecting the results of the election shall be in writing and shall contain a brief statement of facts upon which the objections are based. An original and three copies of such objections shall be signed and filed with the board, the original being sworn to. The party filing an objection shall serve a copy upon each of the other parties to the election.

Looking to Montana law, and addressing the period for filing objections under Montana law, Unit Modification 5-1976, Committee for Freedom of Determination vs. Montana Public Employees Association and Montana University System, Board of Regents, a case involving a "unit clarification and/or unit decertification", the Board, in addressing a request for a new election determined, consistent with federal precedent that, " A democratic election must stand if it goes unchallenged within the five (5) day period as required by our rules, until a proper decertification petition can be brought not more than 90 days nor less than 60 days before the present contract's termination date again. This is mandatory for stability." Thus, although there is authority for BOPA to review certifications, just as under federal law, such a review must be done in accord with proper procedures. That was not done here. The meeting of March 23, 2010, is not sufficient cause to have disturbed the laboratory conditions necessary for a proper election and moreover, the failure to file objections to the election in a timely manner is a bar to the request of Local 1686 to set aside the results of that election.

III. Recommended Order

It is hereby recommended that Unfair Labor Practice Charge 43-2010 be dismissed as without merit.

Dated this 3rd day of August 2010.

BOARD OF PERSONNEL APPEALS

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By: John Andrew, Investigator

NOTICE:

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

CERTIFICATE OF MAILING

I, _____ , do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of _____ 2010, postage paid and addressed as follows:

DAVID L NIELSEN CITY ATTORNEY
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